

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Real Estate
Salesperson License Application of Hai
Thanh Nguyen

**FINDINGS OF FACT, CONCLUSIONS
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 18, 2005. The OAH record closed at the conclusion of the hearing.

Michael J. Tostengard, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Minnesota Department of Commerce (Department).

The Respondent, Hai Thanh Nguyen, 9324 31st Ave N., New Hope, MN 55427, appeared on his own behalf without counsel.

NOTICE

This Report is a recommendation, **not** a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Murphy, Deputy Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101 to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a . The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Did the Respondent engage in acts or practices demonstrating that he is untrustworthy, incompetent, or unqualified to receive a real estate salesperson license pursuant to Minn. Stat. § 45.027, subd. 7(a)(4)?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent is a 27 year old man born on September 10, 1978. He lives in New Hope, Minnesota. He has been a karate instructor since the age of 16. At age 17, he began working as an assistant manager at Snyder's. Most recently, he has been working in the printing business.¹

2. On November 2, 2002, Respondent was one of four men arrested and charged with assault in the second degree. The assault involved the four men, all with Vietnamese names and one or two of whom were the Respondent's brothers, jumping out of a red truck and viciously attacking two people in front of a restaurant at 1755 Lexington Ave N. in St. Paul with dangerous weapons consisting of bats, pipes, clubs, a belt, and metal knuckles. The Respondent was identified by witnesses and other evidence as the person who got out of the passenger seat and used metal knuckles to strike one of the victims in the face, knocking him to the ground.²

3. The Respondent was interviewed by police at the scene. He admitted that the four of them had been in a physical confrontation with two individuals and that he had struck a person who immediately fell to the ground. He admitted that the metal knuckles were his. The Respondent also admitted to the police that he knew that the group was going out looking for someone and that there would likely be trouble.³

4. On December 3, 2002, the Respondent pled guilty to three offenses: assault in the second degree with a dangerous weapon inflicting substantial bodily harm, assault in the second degree with a dangerous weapon, and assault in the third degree inflicting substantial bodily harm. He was convicted based upon his guilty plea. On July 15, 2003, the Respondent was sentenced to prison for 21 months, with a minimum incarceration of 14 months, with a maximum supervised release time thereafter of seven months.⁴ The Respondent was released from prison August 3, 2004.⁵

¹ Testimony of Hai Thanh Nguyen; Ex. 1.

² Ex. 2.

³ Ex. 2.

⁴ Ex. 3.

⁵ Testimony of Nguyen.

5. The Respondent decided to become a real estate salesperson. He completed the required three courses on January 28, 2005, February 17, 2005, and February 24, 2005.

6. On February 25, 2005, the Respondent applied for a license to be a real estate salesperson. He disclosed his criminal record on the application and signed a BCA Form, which authorized the Bureau of Criminal Apprehension to complete a criminal background check and the Minnesota Department of Revenue to disclose and verify Respondent's state tax verification number.⁶

7. The Respondent attached an explanation of his conviction to his application. It stated:

To whom it may concern,

In the year in November 1, 2002 [sic] I got into a fight with some unknown people at the time. I was charged with 2nd degree assault. I was then convicted of that charge June 12, 2003. I was sentenced to 21 months in the department of corrections. I've finished my sentence and got out early for good behavior. This is my first felony and I haven't been in trouble since with the law.

I have finished with my sentenced [sic] completely and I'm waiting for my discharge papers from the department of corrections. I want to get back on my feet and provide support to my two children and the one that is on the way. Please give me a chance. I shall fax any papers you'll need.⁷

8. The Department then obtained copies of the criminal complaint against the Respondent and his probation referral form.⁸ After reviewing that information and information submitted in the Application, the Department determined the Respondent should not be licensed as a real estate salesperson. It did so because the assaults he was convicted of were recent, serious, violent, and involved the use of weapons. The Department was concerned because real estate salespersons have unsupervised access to homes through the lock boxes that are placed on all listed homes and properties.⁹

9. On October 18, 2005, the Commissioner of Commerce issued an Order Denying License, Statement of Charges, and Notice of Hearing. The Notice of Hearing stated that the Department initiated this action to determine whether Respondent violated Minn. Stat. §§ 45.027, subd. 7(4), by engaging in an act or practice that demonstrates that he is unworthy or incompetent or unqualified to act as a real estate

⁶ Ex. 1.

⁷ Ex. 1.

⁸ Exs. 2 and 3.

⁹ Testimony of Julie Kosmalski.

salesperson and ordered the Respondent to show cause why his application for a real estate salesperson license should not be denied.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 45.027, subd. 7, and 14.50 (2004).
2. The Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.
3. The Department has complied with all relevant procedural requirements.
4. Under Minn. Stat. § 45.027, subd. 7(a)(4), the Commissioner may deny a real estate salesperson license if the applicant has engaged in an act or practice, whether or not the act or practice directly involves the business which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.
5. The Respondent's recent felony conviction on three counts of assault in the second and third degree are unrelated to a real estate salesperson's license and do not demonstrate that the Respondent is untrustworthy, incompetent, or unqualified to act as a real estate salesperson.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce grant Respondent's application for a real estate salesperson license.

Dated: December 21, 2005

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Tape recorded (one tape) not transcribed

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The crime the Respondent was convicted of was a vicious gang-type assault. At the hearing, the Respondent attempted to minimize his involvement by saying he was just along for the ride and did not actively participate in the assault. But the evidence presented in the criminal complaint makes it quite clear that he was in the passenger seat of the truck and jumped out and delivered a blow to the face of the victim using the metal knuckles. He was also aware that the group was out looking for trouble. The Respondent also claimed at the hearing that he accepted responsibility for the assault to protect his brother. It is not clear what he meant by that.

The Respondent argues that because he accepted responsibility for his crime and served his time without incident, and because the crime is not related to the duties of a real estate salesperson, he should be allowed the opportunity to work in the real estate business and earn a good income for himself and his family.

Minn. Stat. § 364.03, subd. 1, provides that notwithstanding any other statutory provision to the contrary, "no person shall be . . . disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the . . . occupation for which the license is sought." Conversely, Minn. Stat. § 45.027, subd. 10, provides that Chapter 364 does not apply where the underlying conduct on which the conviction is based would be grounds for denial of the license.

This particular assault was vicious and demonstrated poor judgment and lack of character, but it does not relate to selling real estate. It was not done to a client or customer. It was not a crime involving money or a breach of trust. It does not indicate that the Respondent is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified. It does not indicate that he is likely to enter a house for illegal purposes using the key in a lockbox. It does not indicate that the Respondent would pose a danger to clients or the public if he were granted a license. As far as the evidence shows, this crime was an isolated incident in the Respondent's life and unlikely to reoccur. He had no problems in employment prior to the assault and has had none since his release. Even during his imprisonment, he had no problems that caused his minimum sentence to be extended. He had no criminal problems prior to his arrest and has had none since his release.

There is some concern because the Respondent was not completely truthful at the hearing about his involvement in the assaults. He minimized or rationalized some of his actions. But, since the moment of his first interview by the police, to his plea of

guilty, to his application to the Department, to his testimony at the hearing, he has admitted his involvement and accepted responsibility for his actions. His record is otherwise clear. The Respondent's participation in the assault and subsequent conviction should not disqualify him from now having the opportunity to work as a real estate salesperson.

S.M.M.